(1)

91-1709

Supreme Court, U.S.
FILED
APR 14 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991
No. ___-___

In Re:

Jacqueline Mills,

Petitioner,

-against-

HONORABLE SOL WACHTLER,
Chief Judge of the New York
State Court of Appeals,

-and-

Dennis J. Pappas, William
G. Ripp, and the firm of
Pappas & Russo, defendants'
in the Court below,

Respondents.

PETITION FOR COMMON LAW WRIT OF CERTIORARI AND/OR MANDAMUS TO THE NEW YORK STATE COURT OF APPEALS

Respectfully Submitted,

Jacqueline Mills Pro Se
Post Office Box 27
White Sulphur Springs
New York 12787

BEST AVAILABLE COPY

Was the Seventh Amendment to the United States Constitution right to trial by a jury in a civil case, violated when the lower courts granted the defendants' motion for summary judgment based upon perjured affidavits, absent any hearing, and were the defendants', as attorney's at law, under an obligation to disclose such perjury, or, in the alternative, was the "one" attorney representing the defendants under an obligation to disclose such perjury to the prejudice of his clients?

When an attorney at law, acquires a principle interest in the subject matter of his previous employment, proceeds against his own former client in said matter to "limit his liabilities", while proceeding contrary to well established rules and procedure, and causes proximate injury to said former client, can the lower courts preclude recovery based upon an "unwritten law" of unethical conduct, whereupon recovery is not permitted?

Whether the needs of the pro se litigant were met by the court's below?

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IN THE SUPREME COURT OF THE UNITED STATES

In Re:

JACQUELINE MILLS,

Petitioner,

-against-

HONORABLE SOL WACHTLER,
Chief Judge of the New York
State Court of Appeals,

-and-

DENNIS J. PAPPAS, WILLIAM
G. RIPP and the FIRM OF
PAPPAS AND RUSSO, defendants
in the Court below,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR COMMON LAW WRIT OF CERTIORARI AND/OR MANDAMUS

Jacqueline Mills, petitioner herein, moves this Court as follows:

1. For leave to file the petition for common law writ of certiorari and/or mandamus, hereto annexed.

2. Upon granting such leave, to issue a writ of mandamus, directed to the resp-

ondent, the Honorable Sol Wachtler, Chief Judge of the New York State Court of Appeals, in accordance with the prayer of said petition, and granting petitioner such other and further relief herein as this Court may deem just and equitable.

Dated: April 13, 1992

Jacqueline Mills
Petitioner Pro Se

Post Office Box 27
White Sulphur Springs
New York 12787

TO: Honorable Sol Wachtler
Chief Judge of the New
York Court of Appeals
Court of Appeals
Clerk's Office
Albany, New York 12207

Mr. Stephen Gaba, Esq.
Drake, Sommers, Loeb,
Tarshis & Catania, P.C.
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12550

IN THE SUPREME COURT OF THE UNITED STATES

In Re:

JACQUELINE MILLS,

Petitioner,

-against-

HONORABLE SOL WACHTLER,
Chief Judge of the New York
State Court of Appeals,

-and-

DENNIS J. PAPPAS, WILLIAM
G. RIPP and the FIRM OF
PAPPAS AND RUSSO, defendants
in the Court below,

Respondents.

PETITION FOR COMMON LAW WRIT OF
CERTIORARI AND/OR MANDAMUS

Jacqueline Mills, petitioner herein, petitions this Court to issue a common law writ of certiorari and/or mandamus, directed to the Honorable Sol Wachtler, Chief Judge of the New York State Court of Appeals, and shows as follows:

I. Official Report of Opinion Below

The opinion of the Honorable Sol Wach-

tler, Chief Judge of the New York State Court of Appeals, is reported in Appendix A at pages 1 thru 5.

II. Jurisdiction

Jurisdiction to grant the common law writ of certiorari and/or mandamus, sought by petitioner herein, to compel review of the lower court proceedings by the New York State Court of Appeals, and/or this Court, is conferred on this Court by the provisions of Section 1651(a), Title 28, United States Code, and Rule 20 of this Court.

III. Questions Presented

Was the Seventh Amendment to the United States Constitution right to trial by a jury in a civil case violated when the lower courts granted the defendant's motion for summary judgment based upon perjured affidavits, absent any hearing, and were the defendants, as attorney's at law, under an obligation to disclose such perjury, or,

in the alternative, was the "one" attorney representing the defendants under an obligation to disclose such perjury to the prejudice of his clients?

When an attorney at law acquires a principle interest in the subject matter of his previous employment, proceeds against his own former client in said matter to "limit his liabilities" while proceeding contrary to well established rules and proceedure, and causes proximate injury to said former client, can the lower courts preclude recovery based upon an "unwritten law" of unethical conduct whereupon recovery is not permitted?

Whether the needs of the pro se litigant were met by the court's below?

IV. Constitutional Provisions and Statutes Involved

A. Constitutional

This case involves the Seventh Amendment to the Constitution of the United States, which provides for a jury trial in civil

cases for issues of fact (See Appendix for complete cite at page 37).

B. Statutes

This case involves section (1) of New York State, Judiciary Law, §487, which states in pertinent part:

> "Misconduct by attorneys.—
> An attorney or counselor who:
>
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or
>
> 2. deleted
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

This case also involves section 6 of New York State, CPLR §214, which requires that an action for malpractice, other than medical malpractice must be commenced within three years (See Appendix, page 38).

V. Statement of the case

Petitioner brought an action against the defendant's for negligent/malpractice and deceit upon a court. This action was as a result of the defendant's conduct in an underlying matter in which petitioner's former attorney, PAPPAS, had acquired a principle interest in the subject matter of his previous employment, waited over four years, and then proceeded against his former client (petitioner herein) in the identical matter to "limit his liabilities" by the defendant's as above captioned. All of the elements of negligent/malpractice were contained in petitioner's verified complaint served in this action. It should be noted by this Court, that the aforementioned cause of action was equally sufficient as stating a cause of action for prima facie tort, however, the actions of the defendant's in the underlying matter were so contrary to well established rules of proceedure, that normal traditional cat-

egories of tort could not be utilized.

Defendant's pleaded culpable conduct and failure to state a legally sufficient cause of action.

After defendant's had obtained virtually all forms of discovery and/or disclosure, and the petitioner had obtained nothing, defendant's, by "one" attorney of record, moved for summary judgment to dismiss. Petitioner opposed and submitted eighteen pages of disputed facts, while alleging that defendant's, and defendant's counsel had committed perjury in support of said motion. Petitioner cross-moved for summary judgment, which was not opposed by the defendants.

No hearing was conducted by the trial court on this motion for summary judgment, nor did the trial court inquire further on the apparent possibility of conflict of interest where the defendant's "in mass" were represented by "one attorney" of record.

At no time in the trial court proceedings did defendant PAPPAS appear and/or submit an affidavit. The only affidavit submitted by defendant RIPP was in conflict with another affirmation submitted in the underlying matter. A hearsay affidavit of RUSSO was submitted and although alleged as based upon "personal knowledge", the same contained false material facts. Counsel for the defendant's submitted an affidavit, not based upon anything, but, alleging facts that were patently false.

The Ruling Below-Trial Court

The trial court ruled that the petitioner had not stated a cause of action for false arrest, malicious prosecution, or abuse of process, and further, stated that petitioner had not shown evidence that defendant's had engaged in a "chronic, extreme patterns of legal delinquency" in support of her cause of action under N.Y.S. Judiciary Law §487 (1), and granted summary judgment dismiss-

ing the action (See Appendix page 24).

Petitioner, on reargument/renewal, submitted photo copies of N.Y.S. Judiciary Law §487(1) with current case law indicating that the trial court had applied the requirements of 487(2) incorrectly, and showed that there was no requirement that fraud upon a court require a chronic, extreme patter of legal delinquency. Petitioner further argued the perjured statements by the defendant's as well as their counsel. The trial court refused to consider the petitioner's arguments, never conducted any hearing, and denied the motion. (A- 31-33)

The Ruling Below-Appellate Division

Petitioner presented an academic appeal to the Appellate Division, Third-Department based upon "issue finding as opposed to issue determination" combined with the existence of all elements of legal malpractice pleaded in the complaint. She further argued that the false statements of material

facts, conflicting affidavits of the defendant's in the trial court matter, and the total absence of defendant PAPPAS, could not, as a matter of law, support a grant of summary judgment to the defendant's. She further argued that it was not possible for N.Y.S. Judiciary Law §487(1) to require a "chronic, extreme pattern of legal delinquency", as, by statute, said statute stated "any" deceit. (A- 37)

The Appellate Division, Third Department in its memorandum decision (A- 7 thru 16) based upon the facts and the law, stated facts that were totally contrary to the real documentary evidence contained in the record on appeal. Said memorandum further held that the acts complained of occurred subsequent to PAPPAS termination as attorney for the petitioner, and, was therefore not actionable. Said court further stated that any alleged malpractice based upon a claimed conflict of interest, is at most

a violation of defendants' ethical responsibilities, holding that this was insufficient as a basis for imposing liability.The court alleged, for the first time, that it was wholly attributable to the culpable conduct of the petitioner herein as to any damages, and that any perjury of the defendant's in the underlying matter was the sole fault of the petitioner (A- 15).

Petitioner motioned the Appellate Division for permission to appeal to the Court of Appeals, as said court had rendered a unanimous affirmance of the trial court. Said motion was denied.(A-17).

The Ruling Below-Court of Appeals

Petitioner then moved the Court of Appeals pursuant to N.Y.S., CPLR §5602(a)(1)(i) & (ii) so as to appeal said decision. Said Court denied the motion (A-3-5) and again denied the motion on rehearing (A- 1-2).

Said Court of Appeals has stated in pertinent part:

> "The Court of Appeals grants leave to an aggrieved party to prosecute an appeal from a unanimous decision of the Appellate Division which finally determines an action or special proceeding whenever it will further the 'interest of substantial justice' (Subdiv. 5, §588, Civil Practice Act)." [1]

Had an error been made by the petitioner regarding an appeal as of right, versus an appeal by permission, then it was simple enough for said Court of Appeals to merely sua sponte dismiss the motion for permission and grant leave to appeal, as said court has done in the past for an attorney under similar circumstances, to insure the right to appeal[2]. However, said court did not permit the petitioner herein to proceed with her appeal, although it has merit.

VI. Basis of Court of Appeals Jurisdiction

The Court of Appeals had jurisdiction to

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1. West 158th Street Garage Corp. v. State (1939), 256 App.Div. 401, 10 N.Y.S.2d 990, 257 App.Div. 875, 12 N.Y.S.2d 759.
2. Bruno v. Peyser, (1976), 40 N.Y.2d 827, 387 N.Y.S.2d 563, 355 N.E.2d 792.

grant petitioner permission to appeal pursuant to N.Y.S., CPLR §5602(a)(1)(i) & (ii). Petitioner in her motion for permission to appeal had asked that the question to be considered was to be, "was the decision of the lower court correctly made?"

VII. Reasons relied on for Allowance of Writ

The petitioner has been denied her right to a jury trial in a civil matter contrary to the Seventh Amendment to the Constitution of the United States. This denial resulted in the dismissal of her action for damages inflicted, based in substantial part, on the perjured statements made by the defendant's herein, as well as their "one" attorney of record. The underlying matter is currently on appeal in the Second Department of the Appellate Division. It was argued that should the erroneous decision of the Third Department be permitted to stand, it would result in confl-

icting decisions between Departments within the State of New York, as there is no possible way that the underlying matter can stand as a matter of law.

The underlying matter lacked jurisdiction and this Court has previously stated through Justice MARSHALL:

> "A Court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospectively only". [3]

Despite the fact that the underlying court lacked jurisdiction, although it alleged that jurisdiction was not pertinent,[4] the underlying court failed to establish the basis principle that any court must have jurisdiction in rem or in personam to enter a valid judgment[5]. The result of just

---

3. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379; 101 S.Ct. 669, 66 L.Ed.2d 571.
4. See Appendix at page 35.
5. 4 Carmody-Wait 2d, N.Y. Prac., §25:3, p. 4; accord Hanson v. Denckla, 357 U.S. 235, 250; 78 S.Ct. 1228, 1237; 2 L.Ed.2d 1283.

such a lack of jurisdiction, renders the entire proceedigns coram non judice and void. This does not, however, address the totally impermissable conflict of interest that is unprecedented in the United States. After the erroneous decision of the underlying court, petitioner herein immediately moved said court to vacate. While the motion was pending, defendant's moved ex-parte for an order to show cause to hold the petitioner in contempt of the memorandum decision of the underlying court, which subsequently resulted in her arrest by a warrant that was based upon an order that did not exist, for an alleged contempt of a memorandum decision of said court, in a matter in which the underlying court lacked jurisdiction[6].

The instant matter at bar, was contrary to the standards of summary judgment, pursuant to New York Law, CPLR §3212 and can-

6. See, Firestone Tire & Rubber Co. supra.

not be permitted to be overlooked and ignored based solely upon the nature of the action herein. The standards for summary judgment must be applied irrespective of whether or not the defendant's are attorney's at law, or non-lawyers.

The fact that summary judgment was granted based in substantial part on perjured affidavits, makes this more reprehensible. This Court has stated in pertinent part, through Justice BURGER,

> "These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.5. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by was of promisses and threats, and undermines the administration of justice. See 1 W.Burdick, Law of Crime §§293, 300; 318-

336 (1946).[7].

In addition to the perjured statements, the defendants were represented by "one" attorney of record, which may have significantly altered the "facts" as stated by the defendants. This Court, in addressing defendant's being represented "in mass" by one attorney has stated in pertinent part, through Justice POWELL:

> "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest. E.g., Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980); Holloway v. Arkansas, 435 U.S. 475, 481, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978). Here petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly. It was his duty originally at sentencing and later at the revocation hearing, to seek to convince the court to be lenient. On the record before us, we cannot be sure whether counsel

7. Nix v. Whiteside (1986), 475 U.S.157, 89 L.Ed.2d 123, 106 S.Ct. 988.

> was influenced in his basic strategic decisions by the interests of the employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below." [8]

Conversely, when defendants are represented by only "one" attorney hired by the employer, it can lead to just the circumstances at bar, whereupon the perjured affidavits are consistent in their false statements, but, they are none-the-less false. Here, the trial court failed to inquire of the defendants regarding the conflict of interest, contrary to said courts duty [8]. This becomes patently clear, when as in this matter, the petitioner has been deprived of any and all discovery, disclosure and the court ordered examination before trial that was thwarted by the defendants motion for summary judgment, made on the

8. Wood v. Georgia (1981), 450 U.S. 261, 67 LEd.2d 220, 101 S.Ct. 1097.

eve of the court ordered examination before trial, clearly indicates that there has been a conscious effort on the part of the lower courts, to "preserve" the integrity of the Bar, at the expense of the injured former client. The main problem with this posture, is that when the lower court attempts to protect an attorney, it does in affect participate with such conduct. That of course, lends itself to the belief that an impartial and disinterested tribunal in this matter cannot be had, while distorting the concept of procedural due process. In this matter, petitioner can prove to this Court, that the scales of justice have not prevailed on an equal basis between the contending parties, but, rather, they have clearly indicated that the overridding interest in this matter is to further limit the liabilities of the attorney's at law in the State of New York to the detriment and injury of the former

clients, irrespective of any due process, which erodes confidence in the judicial system itself. It further indicates that there is prejudice of the arbiter being predisposed to find against the former client irrespective of the facts presented.

Conflicts with Federal Law & Other States:

Federal law does not require privity to permit recovery as against an attorney[9]. It has held that an attorney may be sued by an injured party (i.e. third party) in an action under 42 U.S.C.S. §1983. Recently, this statute has provided for recovery as against state officials for personal liability for damages based upon official acts, when such action was brought in an individual capacity[10] when under color of state law.

9. Buller v. Buechler (1983, CA8 SD), 706 F2d 844, 72 ALR Fed 711.
10. Hafer v. Melo (1991) 502 U.S.___, 116 L.Ed.2d 301, 112 SCt. ___.

Other States have touched on conflict of interest, and in accordance with the general rule that an attorney cannot, upon termination of representation of a client, represent one whose interests are adverse to those of his former client, the Indiana Appellate Court held:

> "we think that such a representation would expose the attorney to an action for malpractice" 11

The American Law Review has specifically stated that an attorney is prohibited from proceeding on behalf of another against his own former client, and states that a malpractice action based upon conflicting interests is merely another basis for a malpractice action[12]. In California, an attorney was held civilly liable to a client who suffered loss caused by the lack of disclosure based upon conflict of interest.[13]

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11. Apple v. Hall(Ind.App) 412 N.E.2d 114
12. 28 ALR3d 389
13. Lysick v. Walcom (1968) 258 Cal App. 2d 136, 65 Cal Rptr 406, 28 ALR3d 368.

The N.Y. Jurisprudence 2d, specifically states:

> "The issue whether specific conduct constitutes malpractice normally requires that a factual determination be made by the jury, thereby precluding summary judgment where there is an issue regarding the underlying facts". 14

What becomes more interesting, is that as aforestated from N.Y.Jur2d, the case in the same cited for support of this conclusion, eminates from the same Third Department, Appellate Division[15].

What does however transcend any Federal Law and/or State Law, is the question of conflict of interest as it applies to the former client.

The American Bar Association, at the ABA convention on August 2, 1983, adopted new provisions regarding conflict of interest which states in relevant part:

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14. 76 N.Y.Jur2d §66, page 76.
15. Grago v. Robertson (1975, 3rd Dept) 111 A.D.2d 493, 488 N.Y.S.2d 876.

> "(a) lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation".

In the official comment to Rule 1.9, it is noted that this provision was designed to provide a firm ground for decisions on which had been previously premised on the injunctive reading of Cannon 9, whereas it had stated that the attorney should avoid even the appearance of impropriety.

The general rule that prohibited any attorney from acquiring an adverse interest in the subject matter of his employment is tersely stated in 5 Am Jur, Attorneys at Law § 58:

> "It is well established that an attorney cannot deal for himself in the subjectmatter of the litigation to the prejudice of his client's interest, and can in no case, with-

> out the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates; all such purchases inure to the benefit of the client. It is contrary to the policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of advisor of his client concerning a pending litigation threatening the title to his property and that of the purchaser of such property in opposition to the title of his client."

This matter at bar, goes more deeply than the aforementioned, as in this matter, the defendant PAPPAS was the scrivener of the will, he notarized the will, included himself within the same as successor executor and then served as attorney for the petitioner while she was executrix. The situation of attorneys at law naming himself as executor is discussed in 57 ALR3d 703.

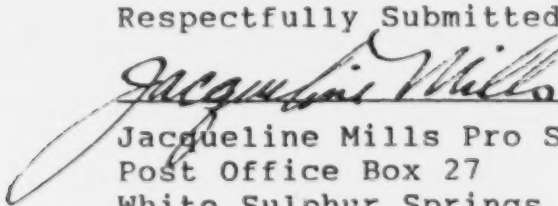
In the record, should this Court permit

this application, it will be shown that in the trial court proceedings it is uncontroverted that PAPPAS went exparte to the underlying court, which resulted in a sua sponte, exparte order to account against the petitioner herein, which resulted in her removal, which was also sua sponte by the underlying court and contrary to law.

VIII. Conclusion

For the reasons stated, this application for leave to file the petition for common law writ of certiorari and/or mandamus should be granted to correct the erroneous determination below, and provide direction for said Courts who have so far departed from accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Respectfully Submitted,



Jacqueline Mills Pro Se
Post Office Box 27
White Sulphur Springs
New York 12787

Appendix

Copy of Court of Appeal's Order:

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of January, A.D. 1992

Present, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 1428

Jacqueline Mills,
Appellant,
v.
Dennis J. Pappas et al.,
Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York
12207

DECISION January 16, 1992

Mo. No. 1428
Jacqueline Mills,
Appellant,
v.
Dennis J. Pappas et al.,
Respondents.

Motion for reargument of motion for leave to appeal denied.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of November A.D., 1991

Present, HON. SOL WACHTER, Chief Judge presiding.

3-10 Mo. No. 1146
Jacqueline Mills,
Appellant,
v.
Dennis J. Pappas et al.,
Respondents.

A motion for leave to appeal to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the order of the Appellate Division denying plaintiff's motion for leave to appeal, be and the same hereby is dismissed upon the ground that the order does not finally determine the action within the meaning of the Con-

stitution; and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from that portion of a separate order of the Appellate Division, which affirmed Supreme Court's order denying plaintiff's motion for renewal and/or reargument and Supreme Courts order denying plaintiff's motion to vacate the judgment against her, be and the same hereby is dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York
12207

DECISION November 26, 1991

3-10 Mo. No. 1146
Jacqueline Mills,
Appellant,
v.
Dennis J. Pappas et al.,
Respondents.

Motion, insofar as it seeks leave to appeal from the order of the Appellate Division denying plaintiff's motion for leave to appeal, dismissed upon the ground that that order does not finally determine the action within the meaning of the Constitution; motion, insofar as it seeks leave to appeal from that portion of a separate order of the Appellate Division, which affirmed Supreme Court's order denying plaintiff's motion for renewal and/or reargument and Supreme Court's order denying plaintiff's motion to vacate the judgment against

her, dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution; motion for leave to appeal otherwise denied.

Supreme Court-Appellate Division
Third Judicial Department

Decided: June 6, 1991 60986

JACQUELINE MILLS,
Appellant,
v.
DENNIS J. PAPPAS et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: April 22, 1991

Before: Mahoney, P.J., Weiss, Levine, Mecure and Harvey, JJ.

Jacqueline Mills, White Sulphur Springs, appellant in person.

Drake, Sommers, Loeb, Tarshis & Catania, P.C. (Stephen J. Gaba of counsel), Newburgh for respondents.

Levine, J.

Appeals (1) from an order of the Supreme Court (Bradley, J.), entered March 19, 1990 in Sullivan County, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, (2) from an order of said court, entered October 12, 1990 in Sullivan County, which,

inter alia, denied plaintiff's motion for reconsideration, and (3) from an order of said court, entered October 12, 1990 in Sullivan County, which, inter alia, denied plaintiff's motion to vacate a judgment entered against her.

Plaintiff was the named executrix in the will of Craig Griffin, who died in 1980. She retained defendant Dennis J. Pappas, a member of the law firm of defendant Pappas & Russo, as attorney for the estate. Pappas was the alternative executor under Griffins will. Pappas withdrew from representation of the estate in 1981 and plaintiff then retained Dana Winslow. Because of a complaint concerning the delay in processing probate of the estate, the Nassau County Surrogate's Court ordered plaintiff to file an accounting by April 28, 1982.

Plaintiff took it on her own responsibility to prepare and submit an accounting in Surrogate's Court. Her "informal accounting"

was subsequently rejected by the court. Winslow then withdrew as her attorney. Surrogate's Court then ordered that plaintiff be removed as executrix for failing to obey the court's prior order to account and appointed Pappas as successor executor in accordance with Griffin's will.

Next, Pappas brought a motion in Surrogate's Court to compel plaintiff to account for her administration of the estate before removal. Plaintiff opposed on the grounds of various irregularities in the moving papers and in the manner of service of citations. Surrogate's Court granted the motion and ordered plaintiff to file an accounting within 15 days of service of the order. Plaintiff's motion to reargue was denied.

Thereafter, plaintiff was served with a Surrogate's Court order to show cause seeking to have her held in contempt for ignoring the order to account. She failed

to appear on the return date and a contempt order was issued, which authorized the issuance of a warrant in the event that plaintiff did not file an accounting within 20 days. After that period expired, a warrant was issued, plaintiff was arrested, brought before Surrogate's Court and directed to be subject to an examination for an accounting. The record, however, does not indicate any further disposition of the proceedings in Surrogate's Court.

Plaintiff then brought the instant action against Pappas and various attorneys in the Pappas & Russo law firm, which represented the Griffin estate, seeking compensatory damages, treble damages and punitive damages. After joinder of issue and while discovery was pending, defendants moved for summary judgment. Plaintiff opposed defendants' motion and cross-moved to, inter alia, strike defendant's answer for failure to comply with discovery. Supreme

Court denied plaintiff's cross motion and granted defendants summary judgment dismissing the complaint. These appeals followed.

There should be an affirmance. Giving plaintiff's rather discursive pro se complaint and papers in opposition to defendants' motion the benefit of every reasonable intendment, she has pleaded causes of action sounding in legal malpractice, false arrest, abuse of process, malicious prosecution and fraudulent and deceptive practice by attorneys in violation of Judiciary Law § 487 (1). All of the causes of action are based upon the alleged irregularities, misrepresentations and an undisclosed conflict of interest on the part of defendants in the proceedings before Surrogate's Court, wherein she was ordered to file an account for her tenure as executrix of the Griffin estate, held in contempt for failing to do so and arrested on the warrant. On the basis of the undisputed facts, each

of these claims is insufficient to accord her recovery, as a matter of law.

As to the malpractice claim, all of the acts complained of occurred subsequent to the termination of Pappas' representation of plaintiff and, for this reason alone, are not actionable (see, Carey v. Campbell 93 AD2d 923). To the extent that the alleged malpractice is based upon a claimed conflict of interest resulting from the Pappas & Russo firm rpoceeding in Surrogate's Court against plaintiff, any such conflict of itnerest is at most a violation of defendants' ethical responsibilities, an insufficient basis for imposing liability in favor of a former client (see, Brown v. Samalin & Bock, 155 AD2d 407, 408; Brainard v Brown, 91 AD2d 287, 289; see also, Kahn v Crames, 92 AD2d 634, 635). These are nothing more than conclusory allegations that Pappas' negligence in representing the estate in 1981 somehow contributed

to plaintiff's damages. Moreover, she has totally failed to submit any evidentiary proof that nay such negligence prevented her from complying with the order to account. Thus, there is no triable issue on proximate cause, a necessary element of plaintiff's malpractice claim (see, Mendoza v Schlossman, 87 AD2d 606, 607).

Likewise, any of plaintiff's causes of aciton based upon false imprisonment, malicious prosecution and abuse of process are invalid because the undisputed facts conclusively negate necessary elements of such claims. Thus, as to false imprisonment, plaintiff's arrest was pursuant to a warrant, valid on its fact, by a court having jurisdiction and, as such, was privileged (see, Broughton v State of New York, 37 N.Y.2d 451, 456-457, cert denied sub nom. Schanbarger v Kellogg, 423 US 929; Saunsen v State of New York, 81 AD2d 252, 253). Recovery for malicious prosecution

is barred here because of the demonstrated absence of a termination of the contempt proceeding in Surrogate's Court in plaintiff's favor (see, Broughton v State of New York, supra; Campion Funeral Home v State of New York, __ AD2d __(May 9, 1991). Furthermore, plaintiff has submitted no evidence whatsoever to counter defendants' proof that the warrant issued in the Surrogate's Court proceeding was properly used to bring plaintiff before Surrogate's Court for purposes of compelling her to account. The absence of the necessary element of improper use of process after it was issued defeats plaintiff's abuse of process claim (see, Curiano v Suoizzi, 63 NY2d 113, 117).

Finally, as to plaintiff's claim for trebel damages pursuant to Judiciary Law §487 (1) for the allegedly false and deceptive practices on the part of defendants in the proceedings before Surrogate's Court, this again relates to allegations that defend-

ants made misrepresentations on jurisdictional and other matters in those proceedings, and failed to disclose to Surrogate's Court the conflicts of interest of the Pappas & Russo firm in taking action against a former client. However, undisputably, plaintiff did fail to account and persisted in that failure notwithstanding her conceded receipt of a copy of the Surrogate's Court decision directing her to account and of a certified copy of the order entered thereon. Also undisputed is the fact that she disregarded the order to show cause on the contempt application and failed to appear on the return date. Under these circumstances, her cause of aciton under Judiciary Law § 487 (1) fails, as a matter of law, because her damages were entirely attributable to her own neglectful and contumacious behavior and not because of any acts of defendants (see, Brown v. Samalin & Bock, 155 AD2d 407, 408, supra

Di Prima v Di Prima, 111 AD2d 901, 902).

We have reviewed plaintiff's remaining points on all of her appeals and find them equally without merit.

Mahoney, P.J., Weiss, Mercure and Harvey, JJ., concur.

ORDERED that the orders are affirmed, with costs.

ENTER:

/a/ Michael J. Novack

Clerk

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 22nd day of July, 1991.

PRESENT: HON A. FRANKLIN MAHONEY,
Presiding Justice
HON. LEONARD A. WEISS,
HON. HOWARD A LEVINE,
HON. THOMAS E. MERCURE,
HON. NORMAN L. HARVEY,
Associate Justices

Jacqueline Mills,

Plaintiff-Appellant,

-against-

Dennis J. Pappas, William G. Ripp, and the firm of Pappas & Russo,

Defendants-Respondents.

O R D E R

A motion having been made by Jacqueline Mills, plaintiff-appellant, at this term of court in the above-entitled action for an order for reconsideration or, in the alternative, for permission to appeal to the Court of Appeals : NOW, after reading

and filing proof of due service of the notice of motion the affidavit of Jacqueline Mills, in support of the motion, and the affirmation of Stephen J. Gaba, Esq., in opposition thereto and the court having rendered a decision on the 14th day of August, 1991, it is hereby

ORDERED that motion for reconsideration or, in the alternative, for permission to appeal to the Court of Appeals is denied, without costs.

ENTERED: Michael J. Novack
Clerk

DATED AND ENTERED: AUG 21 1991
A TRUE COPY
MICHAEL J. NOVACK
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

Jacqueline Mills,

Plaintiff,

-against-

Dennis J. Pappas, William G. Ripp and the firm of Pappas & Russo,

Defendants.

HON. VINCENT G. BRADLEY
ORDER

Index No. 460/89

PRESENT: HON. VINCENT G. BRADLEY

Plaintiff commenced suit herein on or about December 22, 1988 and issue was joined by all defendants on January 11, 1989. On July 20, 1989 defendants moved pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiff brought a cross-motion seeking to have defendants' answer stricken by order to show cause dated July 26, 1989.

NOW, upon reading and filing defendants'

note of issue and notice of motion for summary judgment dismissing the complaint dated July 20, 1989; the affirmation of Stephen J. Gaba dated July 20, 1989 with exhibits in support; the affidavits in support of WILLIAM G. RIPP and Vincent J. Russo dated July 19, 1989 with exhibits; the order to show cause signed by the Hon. Robert C. Williams dated July 26, 1989; the affidavit in support of order to show cause given by JACQUELINE MILLS dated July 26, 1989 with exhibits; the affirmation in opposition to cross-motion of Stephen J. Gaba dated August 4, 1989 with exhibits and proposed order; and the affidavit in opposition to summary judgment motion and in support of cross-motion given by JACQUELINE MILLS dated October 24, 1989 with exhibits and proposed order;

A decision having been rendered upon the motion and cross-motion by the Hon. Vincent G. Bradley upon January 31, 1990 in which

the defendants' motion for summary judgment dismissing the complaint was granted and the plaintiff's cross-motion was denied, it is

ORDERED, that the motion of defendants, DENNIS J. PAPPAS, WILLIAM G. RIPP, and THE FIRM OF PAPPAS & RUSSO, for summary judgment pursuant to CPLR 3212 is granted, and the claim of plaintiff is dismissed; and it is further

ORDERED, that the cross-motion of the plaintiff, brought by order to show cause is denied in all respects.

Dated: Kingston, New York
March 6, 1990

E N T E R :

Hon. Vincent G. Bradley

Received Sullivan Co. Clerk
March 19, 1990 A.M.11:21

STATE OF NEW YORK
SUPREME COURT CHAMBERS
ULSTER COUNTY COURT HOUSE
KINGSTON, N.Y.
12401

January 31, 1990

Ms. Jacqueline Mills
P.O. Box 27
White Sulphur Springs,
New York 12787

Drake, Sommers, Loeb,
Tarshis & Catania, P.C.
P.O. Box 1479
Newburgh, New York 12550

RE: Mills v. Pappas, et al.
Sullivan County Special Term
RJI # 52-4219
Return date: 10/24/89

Dear counselors:

This letter represents the decision of the court in the above-captioned matter. Defendants have moved for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint. Plaintiff has also moved for an order stricking defendants' answer pursuant to CPLR 3126 because of defendants failure to appear for court-ordered depositions.

As to plaintiff's motion, the depositions and any other discovery proceeding were stayed by defendants' summary judgment motion (Federal Deposit Insurance Corp., v Hyer, 66 AD2d 521 Second Dept. (1979)). Accordingly, this motion must be denied.

As to the summary judgment motion, plaintiff has no cause of action for false arrest. She was taken into custody pursuant to a facially valid warrant issued by the Nassau County Surrogate in accordance with SCPA section 607. Therefore, the arrest was privileged and a false arrest action does not lie (Johnson v. Town of Colonie, 102 AD2d 925 (Third Dept. (1984)). As to plaintiff's malicious prosecution action, it must also be dismissed because there has been no termination of any litigation between the parties in plaintiff's favor (see, e.g. Loeb v. Teitelbaum, 77 AD2d 92 Second Dept. (1980)).

Plaintiff's cause of action for abuse of

process is similarly without merit. The proceeding to compel an accounting and the arrest warrant issued pursuant to a finding of contempt made in the course of the accounting proceeding were fully justified It cannot be said that in maintaining this proceeding, the defendants acted without economic or social justification.

Finally, plaintiff's submissions show absolutely no evidence of "chronic, extreme patterns of legal delinquency" on the part of defendants. Accordingly, plaintiff has no claim based on Judiciary Law sec. 487 (1). Furthermore, since the Court has found that all of plaintiff's claims are without merit, her request for punitive damages must also be dismissed (See, e.g. Cranes v. Wonderknit Corp., 92 AD2d 857 (Second Dept. (1983)).

Defendants' attorneys shall submit a single order consistent herewith.

Very truly yours,

Vincent G. Bradley
Justice of the Supreme
Court

STATE OF NEW YORK
SUPREME COURT CHAMBERS
ULSTER COUNTY COURT HOUSE
KINGSTON, N.Y.
12401

February 13, 1990

Ms. Jacqueline Mills
P.O. Box 27
White Sulphur Springs
New York 12787

Drake, Sommers, Loeb,
Tarshis & Catania, P.C.
P.O. Box 1479
Newburgh, N.Y. 12550

Re: Mills v. Pappas, et al.
Sullivan County Special Term
RJI # 52-4219-89
Return date: 10/24/89

To the parties:

This letter represents the supplemental decision of the Court in the above-matter and supplements the letter decision of the Court dated January 31, 1990. The plaintiff has brought to the Court's attention the fact that it did not address her cross-motion. The omission was inadvertent. The Court did read plaitniff's submission labelled "affidavit in opposition to motion for

summary judgment and in support of cross motion", and found it unpersuasive. As it consists almost entirely of conclusory allegations, nothing contained in it contradicts the legal arguments made by defendants' counsel. Accordingly, the original decision is hereby amended to reflect that the cross-motion is denied.

Defendants' attorney shall submit a single order consistent herewith and with the January 31, 1990 decision.

Very truly yours,
Vincent G. Bradley
Justice of the
Supreme Court

SUPREME COURT O THE STATE OF NEW YORK
COUNTY OF SULLIVAN

JACQUELINE MILLS,

Plaintiff,

-against-

DENNIS J. PAPPAS, WILLIAM G. RIPP AND THE FIRM OF PAPPAS & RUSSO,

Defendants.

ORDER

HON. VINCENT G. BRADLEY
Index No. 460/89

PRESENT: HONORABLE VINCENT G. BRADLEY JSC

On March 6, 1990 an order was signed by this court, Honorable Vincent G. Bradley, JSC, granting the motion of defendants, Dennis J. Pappas, William G. Ripp and the Firm of Pappas & Russo, for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint in its entirety. On April 23, 1990 plaintiff Pro Se brought a motion pursuant to CPLR §2221 for renewal and/or reargument on the court's previous order dismissing

BEST AVAILABLE COPY

the suit. By notice of cross-motion dated May 7, 1990 defendants cross-moved for costs and sanctions under 22 N.Y.C.R.R.§ 130.1-1.

NOW, upon reading and filing the notice of motion for renewal and/or reargument, the affidavit in support of motion given by plaintiff Pro Se, JACQUELINE MILLS, dated April 23, 1990 with exhibits; the notice of cross-motion for costs and sanctions dated May 7, 1990, the affirmation in support of cross-motion and in opposition to plaintiff's motion for reargument/renewal given by Stephen J. Gaba, Esq. dated May 7, 1990 with exhibits, the affidavit in opposition to the motion for renewal and/or reargument made by Vincent J. Russo dated May 3, 1990 with exhibits; the reply affidavit in further

A decision having been rendered upon said motion and cross-motion by this court, Honorable Vincent G. Bradley, JSC, on Septem-

ber 17, 1990, in which the plaintiff's motion for renewal and/or reargument was denied without costs and sanctions, it is:

ORDERED, that the motion of plaintiff Pro Se, JACQUELINE MILLS, for renewal and /or reargument of the prior order dismissing the complaint in its entirety is hereby denied; and it is further

ORDERED, that the cross-motion of defendants is likewise denied in all respects.

DATED: Kingston, New York
October 3, 1990

E N T E R :

Hon. Vincent G. Bradley
J.S.C.

STATE OF NEW YORK
SUPREME COURT CHAMBERS
ULSTER COUNTY COURT HOUSE
KINGSTON N.Y.

September 17, 1990

Ms. Jacqueline Mills
Champagne Acres
White Sulphur Springs
New York 12787

Drake, Sommers, Loeb,
Tarshis & Catania, P.C.
One Corwin Court
PO Box 1479
Newburgh, New York
12550

Re: Mills v. Pappas et al.
Sullivan County Special Term
RJI # 52-4219-89
Return date: 5/14/90

To the parties:

This letter represents the decision of the Court in the above matter. Plaintiff moves for reargument and/or renewal of this court's decision dated January 31, 1990 which dismissed her complaint.

The Court has reviewed the submissions and finds that the motion must be denied. First, there is no proof other than Ms. Mills' bald assertion that proceedings pen-

ding against her in Nassau Cuonty Surrogats Court have been discontinued. In fact, according to the affidavit of Mr. Russo (Cross-Notice of Motion, Exhibit A), the Nassau County case is continuing.

Second, Ms. Mills has shown no new facts that would support a different result, and she has shown nothing which indicates that this Court misapprehended or misapplied the relevant law in making its original decision. Moreover, it is well-settled that the fact that discovery is not complete does not require denial of summary judgment(Chemical Bank v. Pic Motors Corp., 58 NY2d 1023(1983)). Here, Ms. Mills has failed to make any claim that the deposition of defendant Ripp would produce any new facts requiring a result different from that rendered by the Court in its January 31, 1990 decision.

Accordingly, the motion is denied. Defendants' attorney shall submit a single order

consistent herewith.

Very truly yours,

Vincent G. Bradley
Justice of the Supreme
Court

SURROGATE'S COURT : COUNTY OF NASSAU

Proceeding to compel JACQUELINE MILLS, as Executrix under the Last Will and Testament of

CRAIG R. GRIFFIN,

Deceased,

to file an intermediate account.

File No. 204315
Dec. No. 680

This is a petition by a successor executor and trustee to compel an accounting by the former executrix, Jacqueline Mills, who was removed by order of this court dated September 9, 1982, for having previously disobeyed directions by this court to account (see decisions of March 26, 1982 and April 27, 1982). More than five months following her removal, Jacqueline Mills, who has appeared pro se in these proceedings, sought to reargue such removal, blaming her former attorney for any failures on her part. The decision of March 17, 1983 refused to reinstate Ms. Mills as executrix essentially on the grounds of laches and

further on the ground that she had failed to demonstrate her good faith by filing a proper accounting, although having been directed to do so since March 26, 1982.

Ms. Mills in her present answer raises a number of defenses, including the lack of this court's jurisdiction, none of which are pertinent. The petition is granted and the respondent, Jacqueline Mills, is directed to file her account within fifteen (15) days of the service upon her by certified mail without return receipt of a certified copy of the order to be made hereon.

Submit order without notice.

Dated: September 9, 1987

C. RAYMOND RADIGAN
Judge of the
Surrogate's Court

Table of Cases

Apple v. Hall (Ind.App) 412 N.E.2d 114.

Bruno v. Peyser (1976), 40 N.Y.2d 827, 387 N.Y.S.2d 563, 355 N.E.2d 792.

Buller v. Buechler (1983, CA8 SD), 706 F2d 844, 72 ALR Fed 711.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571.

Grago v. Robertson (1975, 3rd Dept), 111 A.D.2d 493, 488 N.Y.S.2d 876.

Hafer v. Melo (1991) 502 U.S. ___, 116 L. Ed.2d 301, 112 S.Ct. ___.

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

Lysick v. Walcom (1968), 258 Cal.App.2d 136, 65 Cal.Rptr. 406.

Nix v. Whiteside (1986), 475 U.S. 157, 89 L.Ed.2d 123, 106 S.Ct. 988.

West 158th Street Garage Corp. v. State, (1939), 256 App.Div. 401, 10 N.Y.S.2d 990, 257 App.Div. 875, 12 N.Y.S.2d 759.

Wood v. Georgia (1981), 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097.

Constitutional Provisions

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Constitution of the United States, Amendment-Seven.

Statutes

New York State Judiciary Law, § 487.

§ 487. Misconduct by attorneys.—An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

New York State Civil Practice Law and Rules

§ 214. Actions to be commenced within three years: for nonpayment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical malpractice; to annul a marriage on the ground of fraud

The following actions must be commenced within three years:

1. an action against a sheriff, constable, or other officer for the non-payment of money collected upon an execution;

2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215;

3. an action to recover a chattel or damages for the taking or detaining of a chattel;

4. an action to recover damages for an injury to property;

5. an action to recover damages for a personal injury except as provided in section 215;

6. an action to recover damages for malpractice, other than medical malpractice; and

7. an action to annul a marriage of the ground of fraud; the time within which the action must be commenced shall be computed from the time the plaintiff discovered the facts constituting the fraud, but if the plaintiff is a person other than the spouse whose consent was obtained by fraud, the

time within which the action must be commenced shall be computed from the time, if earlier, that that spouse discovered the facts constituting the fraud.

Text Books

4 Carmody-Wait 2d, N.Y. Prac., §25:3.

5 American Jurisprudence, Attorney's at Law § 58.

28 American Law Review 3d 389.

57 American Law Review 3d 703.

76 New York Jurisprudence 2d §66, Attorney at Law.

Miscellaneous

American Bar Association, adoption of new provisions regarding conflict of interest; Rule 1.9.